(3)

No. 06-134

FILED
SEP 5 - 2006

In The
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE
PERMANENT REPRESENTATIVE OF MONGOLIA
TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

REPLY BRIEF FOR PETITIONER

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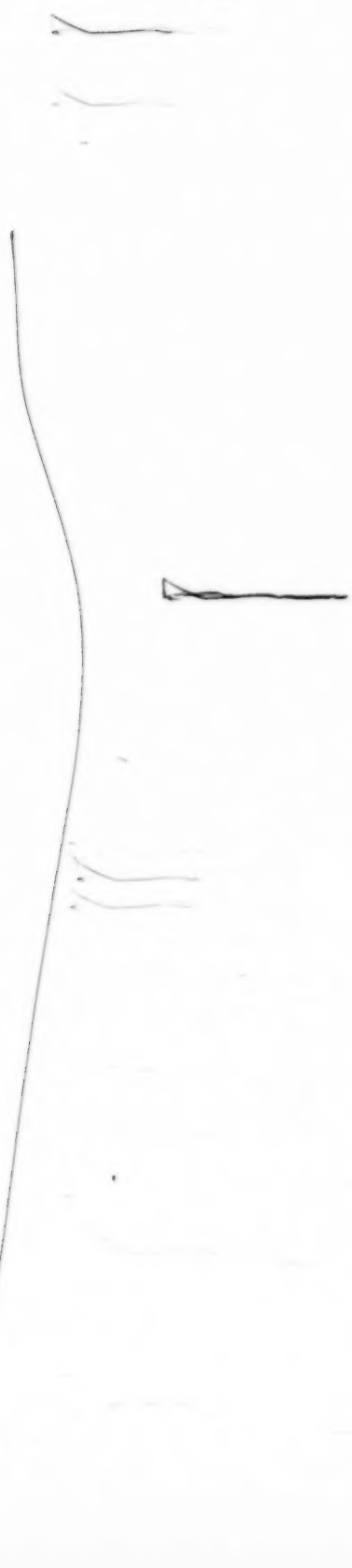

There is a Mature, Live, and Credible Split in the Circuits.

As Petitioners demonstrated in their Petition for a Writ of Certiorari, (the "Petition") there is a present split in the circuits regarding the application of the "rights in immovable property" exception (28 U.S.C. § 1605(a)(4)) to the general denial of jurisdiction over foreign sovereigns guaranteed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *See Petition* at 7-10. The Second Circuit created that split in affirming the district court's finding of jurisdiction over Petitioners, when it expressly rejected the converse holding in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). *See City of New York v. The Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.15 (2d Cir. 2006), (hereinafter ("App." at 20-21).

In *City of Englewood*, the Third Circuit reversed the district court's finding that there was jurisdiction under § 1605(a)(4), instead squarely holding that the "rights in immovable property" exception did not apply to actions to collect taxes against real property held by diplomatic missions. *City of Englewood*, 773 F.2d at 36. The court in *City of Englewood* analyzed § 1605(a)(4) and concluded that it applies to "disputes directly implicating property interests or rights to possession [of real property]." *Id.* (internal quotation marks omitted). Because it was not disputed that Libya had title to the "premises [and could] exclude others from possession thereof," the court held that "section 1605(a)(4) does not apply." *Id.* In doing so, it relied in part on *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984), where that court considered the "immovable rights" exception to be limited – not applying to *any* potential property interest but instead only those "*directly* implicating property interests or rights to possession. . . ." 735 F.2d at 1522 (emphasis added).

Conversely, here, the Second Circuit relied on *Reclamantes* in coming to the opposite conclusion as that

of the Third Circuit in *City of Englewood*. Neither distinguishing *City of Englewood* nor adopting its reasoning, the court below applied the "immovable property" exception to the instant dispute and concluded that the district court did have jurisdiction. Despite the Third Circuit's similar reliance on *Reclamantes*, the Second Circuit reasoned that *Reclamantes* was supportive of its conclusion because the plaintiffs' claims in *Reclamantes* were not "property interests in real estate," rather, they were "purely of historical interest." App. 19 (quoting *Reclamantes*, 735 F.2d at 1523). Thus, even if the Second Circuit had not so expressly rejected *City of Englewood*, both circuits' competing reliance on *Reclamantes* underscores the two circuits' fundamental divergence in interpreting § 1605(a)(4): the Second Circuit interprets the section to apply at least to the tax liens at issue here (*i.e.*, any interest in real property); the Third Circuit interprets the section to apply only to "title" and "possessory" real property interests (*i.e.*, significantly more narrow real property interests). This square conflict is indisputable.

For its part, Respondent concedes that there is a split in the circuits, but asserts that it is not "cognizable" because of this case's posture (although it does not explain what aspect of the present case's posture so renders it and such is not apparent to Petitioners). Brief in Opposition at 13. Similarly unsupported and unsupportable, Respondent obfuscates the direct circuit split (i) with speculation about future cases the Third Circuit might hear; (ii) by claiming that the Third Circuit's decision was "superficial"; and (iii) by characterizing *City of Englewood* as outdated. *Id.* None of these assertions defuses the acute circuit split created by the court below, nor do they minimize the need for this Court to grant Certiorari.

First, Respondent's suggestion that the Third Circuit's decision in *City of Englewood* "is not likely to be followed, even within the Third Circuit" is a puzzle that Respondent does not deign to solve. *City of Englewood* is no further outside a "continuum" of decisions on this statute than

was the Second Circuit's decision below. To the contrary, Petitioners contend that it came to the correct result under the statute and the court's reasoning in *Reclamantes*. On the other hand, whether there is a continuum at all is debatable: *Reclamantes* does not address the specific issue confronted by both the Second and Third Circuits as it addressed claims far attenuated from the kinds of property interests addressed in *City of Englewood* and the case at bar. Thus, how Respondent can assert that *City of Englewood* would not be followed *in its own circuit*, simply because Respondent asserts that the present case is the proper heir to *Reclamantes*, is baffling.

Second, the Respondent's suggestion that the circuit split is "superficial" – apparently because Respondent considered the Third Circuit's opinion to "only briefly and parenthetically discuss[] the immovable-property exception" – ignores the fundamental distinction: foreign sovereigns with real property in New Jersey or other Third Circuit states are presently immune from real property tax lawsuits, but foreign sovereigns with real property in New York or other Second Circuit states are not. Yet Respondent urges this Court to discount the seriousness of this reality based on a word count of the competing decisions. That the Third Circuit's discussion encompassed three paragraphs whereas the Second Circuit wrote several times that, does not counteract the effect upon state tax actions against foreign sovereigns, nor does it render the result – immunity from suit in one circuit but not the other – somehow less significant.[1]

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[1] Any alternative suggestion that the split is superficial because the immovable property exception holding in *City of Englewood* did not go to the heart of that decision, simply because it devotes more space to the commercial activity exception, is likewise flawed. The Third Circuit would have never reached the commercial activity exception if it had not ruled as it did on the property exception; thus, that holding was essential to its reversal of the district court.

Third, the fact that *City of Englewood* has been published authority for 21 years is wholly irrelevant in this context. It is not surprising that the Third Circuit has not had occasion to revisit § 1605(a)(4). It had already published clear, definitive authority in that circuit for district courts and potential litigants to observe and apply. There is no need for further enunciation because the Third Circuit came to a narrow-enough conclusion that in all probability forecloses many potential actions by municipalities on real property owned by diplomatic missions. In other words, there is nothing to suggest that the Third Circuit need revisit its decision in *City of Englewood* and hardly alarming that it has not done so. Respondent's purported ability to read the tea leaves that *City of Englewood* is headed for a forced retirement by the Third Circuit is without basis.

Finally, while it is true that real property tax actions against sovereign nations may not arise often, when they do, they are likely to (i) arise in one of two places – Washington, D.C., and New York City (and suburbs) – encompassed by four circuits; and (ii) raise critical issues of international comity. As to the first, it is consequently unlikely that such cases will arise elsewhere, greatly lessening the likelihood that percolation among the circuits will mature the circuit split. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (denying certiorari because – unlike here – "further study" by lower courts would benefit the Supreme Court). As to the second, although the cases may be few in number, those that do arise are each of vital importance to both the international community and international relations between the United States and foreign sovereigns. In fact, this Court has previously granted certiorari to interpret a related section of the FSIA – presumably because of the importance of the FSIA – and in that case even in the absence of a circuit split. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (certiorari granted to interpret § 1605(a)(3)). Indeed, the FSIA was enacted in part to eliminate the precise problem presented by the circuit

split here: "[D]isparate treatment of cases involving foreign governments." H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 13 (1976). Accordingly, waiting on Respondent's speculation that the Third Circuit may "join the chorus" it extrapolates from *Reclamantes* and *City of New York*, or on other circuits to weigh in on this uncommonly-applied but crucial statute, would be unwarranted and injudicious.

CONCLUSION

For the reasons expressed above and for the reasons expressed in their Petition for Writ of Certiorari, Petitioners respectfully request that the Supreme Court grant the Petition.[2]

Dated: New York, New York
September 5, 2006

Respectfully submitted,

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[2] Petitioners also note that Respondent does not respond to Petitioners' suggestion that this Court should seek the views of the Solicitor General.